IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JORGE LOIS AVILA-NAVARRO, Appellant.	No. 37009-3-II Unpublished OPINION

Hunt, J. – Jorge Lois Avila-Navarro appeals his jury trial convictions for two counts of unlawful delivery of heroin. He argues that (1) the trial court erred in ruling that defense counsel opened the door to otherwise inadmissible hearsay evidence that violated his Sixth Amendment[1] confrontation rights under *Crawford v. Washington*;[2] (2) if we agree that defense counsel opened the door to this testimony, he (Navarro) received ineffective assistance of trial counsel; and (3) the erroneous admission of this testimony was reversible error.[3] Because any potential error in

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[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[2] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that the Confrontation Clause prohibits admission of testimonial statements made out of court by a witness who is unavailable for trial unless the defendant has had a prior opportunity to cross examine the witness).

[3] Navarro also assigns error to two of the trial court's written "reasons for admissibility of the evidence," which the trial court filed more than a month after Navarro's conviction. But Navarro fails to include any argument or citation to the record or legal authority related to this assignment of error. Therefore, we do not consider this assignment of error. RAP 10.3(a)(6).

We note, however, that (1) the record supports Navarro's assertion that the trial court admitted the challenged hearsay testimony under the open door doctrine, not as statements by a co-conspirator; and (2) to the extent the trial court's written findings and conclusions nonetheless suggest that the trial court may have also found the challenged testimony admissible as statements

admitting the challenged testimony was harmless, we affirm.

Facts

I. Background Facts

A. October 10, 2006 Controlled Drug Buy

On October 10, 2006, Pierce County Sheriff's Deputy Kory Shaffer conducted a controlled buy drug operation at an East Pierce County apartment. He used a confidential informant (CI)[4] to purchase drugs from Cristi Godfrey. In Shaffer's presence, the CI called Godfrey to set up a drug purchase, telling Godfrey that he wanted to purchase some heroin. According to the CI, Godfrey told him that (1) she did not have the heroin, (2) she would have to call "[h]er Mexican friend" to get the drugs after the CI gave her the money, and (3) the person she was contacting was the person who supplied her with her own drugs.[5]

Shaffer (1) searched the CI to ensure that he had no drugs or money, (2) fit the CI with a "body wire," (3) gave the CI $80 in prerecorded cash for the drug purchase,[6] (4) dropped off the CI a block away from the apartment where the drug purchase was to take place, and (5) parked where he (Shaffer) had a clear view of the apartment's front door. Shaffer and the other deputies

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of a co-conspirator, any such conclusion would be clearly erroneous because the record does not show that declarant made the challenged statements in furtherance of a conspiracy or that any conspiracy was still in existence at the time declarant made the statements. *State v. St. Pierre*, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988) (to be admissible, a co-conspirator's statements must be "made during the course and in furtherance of the conspiracy.").

[4] The CI had agreed to work as a CI following his own drug arrest.

[5] Although Navarro objected to this testimony below, he does not challenge it on appeal.

[6] This money was never recovered.

working the controlled buy recorded the transmission from the CI's wire. The CI entered the apartment at about 11:20 am, where several other people were using crack cocaine with Godfrey, but Godfrey had not yet received the heroin.

The CI asked Godfrey whether she had talked to "the Mexican"; Godfrey responded that he would be there in 10 to 15 minutes. But he did not arrive within that time frame. While waiting for the drugs, the CI repeatedly asked Godfrey to call the person delivering them to ensure that he was on his way; Godfrey made several calls and confirmed that he was. The CI, who had apparently seen the supplier before, and Godfrey discussed that the supplier was Mexican.

When Jorge Lois Avila-Navarro finally arrived around noon,[7] he went into the bedroom with Godfrey for approximately 20 seconds and then left. Godfrey allowed the CI to select the heroin he was purchasing from a larger amount of heroin, after which the CI left the apartment. As the CI walked away, he commented into the wire that the person who had delivered the drugs had just passed by him in a truck. The CI recontacted Shaffer and handed him a bindle of heroin.

[7] The deputies also saw Navarro arrive at the apartment, driving a light blue or grey Nissan pickup truck, one of the deputies photographed Navarro walking up to the truck. The deputies also recorded the truck's license plate number and learned that the truck was registered to Navarro.

B. November 14, 2006 Controlled Drug Buy

On November 14, the CI assisted Shaffer with another controlled buy operation that again targeted Godfrey. The second operation took place at 10405 South Croft Street, Godfrey's residence. As before, the CI contacted Godfrey and told her that he wanted to purchase some heroin. Shaffer then searched the CI and the CI's vehicle, found no drugs or money on the CI or in the CI's vehicle, and gave the CI $150 in prerecorded money.[8]

The CI drove himself to Godfrey's Croft Street residence while the deputies watched from a distance and listened to the wire transmission.[9] When the CI entered the residence, Godfrey and another person were smoking crack, and Godfrey called someone. Approximately 10 to 15 minutes later, a dark-colored Saturn arrived and parked outside.[10] Godfrey came out, talked to a person inside the car for less than one minute, and then went back inside the residence.[11] The car then drove off. When Godfrey returned, she handed the CI the heroin; the CI left the residence about one minute later.

Deputies attempted to follow the Saturn. One deputy, in an unmarked police car, pulled up next to the Saturn at a stop light and identified Navarro as the Saturn's driver. The Saturn was

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[8] This money was never recovered.

[9] Although the CI was again wearing a body wire, the deputies' attempts to record the November 14 wire transmission failed.

[10] At this point, the deputies could not see who was in the vehicle, but they noted the vehicle's license plate number.

[11] Because it was dark, the deputies could not identify anyone in the Saturn or see how many people were in the car. Nor did the deputies see Godfrey take anything from anyone in the car.

registered to someone named Maria Lopez[12] at the same address listed on Navarro's truck registration. Eventually, the deputies lost track of the Saturn.

C. Search of Godfrey's Residence

During the investigation that followed, the officers obtained a warrant to search Godfrey's residence. The officers found "narcotics," drug paraphernalia, scales, "crib notes," money, and packaging materials. Some of the narcotics field tested positive for cocaine; none of the narcotics field tested positive for heroin.

After the search, Godfrey told Shaffer that (1) she obtained her heroin from a "Mexican male" who stopped by "[e]very couple days," (2) she sometimes paid for the heroin and sometimes got it "fronted" (meaning that someone delivered the drugs and she paid for them later), and (3) she had "middled a few heroin deals" and made five to ten dollars after the deals.

II. Procedure

The State charged Navarro with two counts of unlawful delivery of heroin.[13] It based count I on the October 10 drug transaction and count II on the November 14 drug transaction. The State notified Navarro that it intended to introduce various statements that Godfrey made to the CI and to the deputies investigating the case as statements in furtherance of a conspiracy under ER 801(d)(2)(v).

[12] Although the record suggests that Lopez is Navarro's wife, the jury never heard any evidence explaining Lopez and Navarro's relationship.

[13] The State also charged Lopez based on other drug transactions; the trial court severed their trials.

A. Defense Motion in Limine

Navarro moved in limine to exclude Godfrey's statements to the CI and to the deputies, arguing that (1) the State had not established that the statements were in furtherance of a conspiracy; and (2) because Godfrey was not going to testify at trial, the statements were inadmissible because they violated Navarro's Sixth Amendment confrontation rights under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).[14] The trial court ruled that Navarro's motion was premature; stated the State could not introduce Godfrey's admission that she had acted as a "middler" by distributing drugs that "the Mexican" (Navarro) had supplied under ER 801(d)(2)(v) without first laying the proper conspiracy foundation; invited the parties to raise the issue again when the State had presented some evidence of a conspiracy; and noted that if ER 801(d)(2)(v) applied, admission of the statements would not violate Navarro's confrontation rights under *Crawford*.

B. Godfrey's Statements to Shaffer

On cross examination, defense counsel asked Shaffer if he had ever executed a search warrant at Godfrey's residence on Croft Street and found drugs or drug paraphernalia in the residence. Shaffer responded, "I did find narcotics and drug paraphernalia, money."

Outside the jury's presence, the State asked the trial court to allow it to introduce testimony about Godfrey's statements to Shaffer, arguing that Navarro had opened the door by questioning Shaffer about what he had found during the search.[15] Defense counsel argued that

[14] The trial court had already established that Godfrey was not going to testify at trial.

[15] The State argued as follows:

Your Honor, I didn't want to simply presume this, but I believe that defense has

she had not opened the door by asking for basic information about Godfrey and her residence.[16] The trial court ruled that defense counsel had opened the door with respect to Godfrey's statements to Shaffer in relation to the search warrant[17] and allowed the State to

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> opened the door by asking Deputy Shaffer about a search warrant that was served at Cristi Godfrey's residence on November 27th, 2006. She asked about the service of a warrant and the fact that narcotics, paraphernalia, and money were found there. During the service of that warrant, Deputy Shaffer spoke with Ms. Godfrey. He asked her where she was getting her heroin. She told him, quote, the Mexican guy. The Mexican guy stops by every couple of days to drop off a teener.
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> Deputy Shaffer then asked Ms. Godfrey if she ever sells the heroin to other individuals. She told him that she had, quote, middled heroin deals, but only makes five or ten dollars on the deal.
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> The inference that was raised by the questions by defense counsel about the service of a warrant, the facts that narcotics, paraphernalia and money were found would certainly suggest or infer that Ms. Godfrey is absolutely involved. I believe they have opened the door to then being told the whole picture about Ms. Godfrey's role, given the fact that there was certainly evidence being found there including narcotics and money. There's an explanation for why it was found there and what her role was, so I would ask leave of the Court to question Deputy Shaffer about that conversation with Ms. Godfrey.

Report of Proceedings (RP) (Nov. 7, 2007) at 136-37.

[16] She argued:

> Your Honor, it's my position that we have not opened the door. I asked some basic information about Cristi Godfrey and her residence which is the subject of where the location of the buys were. The reason I go into that is basically my theory of the case is that without her, there's insufficient evidence to show that my client was involved in the deliveries. Perhaps he was, perhaps he had some involvement, but my argument and my theory of the case is we don't know. What if Cristi was the one who supplied the informant with the drugs? I think the confidential informant is going to testify on one of the incidents that he got—if not both, that he got the drugs both from Cristi and paid her the money. By going into those facts, I did not go into any hearsay statements that she made or anyone else made. I still think that would violate the Sixth Amendment right to confront her about any statements that she made while she herself is subject to arrest because she is unavailable as a witness; we don't get to cross examine her on those issues. I don't think those statements should still come in.

RP (Nov. 7, 2007) at 137-38.

introduce this evidence. Shaffer then testified about the statements that Godfrey had made to him, as described above.[18]

The jury convicted Navarro on both counts. Navarro appeals.

ANALYSIS

I. *Crawford* Confrontation Clause

Navarro argues that (1) the trial court erred when it ruled that defense counsel opened the door to Shaffer's testimony about Godfrey's statements following the search, (2) admission of this testimony violated his (Navarro's) Sixth Amendment confrontation rights under *Crawford*, and (3) this was reversible error because Shaffer's testimony about Godfrey's statements corroborated the CI's testimony and allowed the State to overcome the trial court's ruling that the State could not introduce evidence that Godfrey had described herself as "a 'middler' to her 'Mexican' drug supplier" under ER 801(d)(2)(v) without first laying the proper foundation.

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[17] The trial court ruled:

> I think that while I am still troubled by the fact that Ms. Godfrey is not being called as a witness, and I am going to make this ruling extremely limited in scope and do not want anybody to misunderstand that it opens the door to all statements that Ms. Godfrey may have made at any point in time, I do not think that in light of the fact that [defense counsel] inquired with respect to the service of the search warrant on November 27th, 2006, at the Croft Street address, which apparently belonged to Ms. Godfrey and that upon execution of that warrant, they found narcotics, paraphernalia, and money, the Court—the jury is left with the inescapable conclusion that that all belongs to her, which may be the case, but I think the door was opened and allows the State inquiry with this witness as to some explanation as to the items that were found there, through Ms. Godfrey's statements.

RP (Nov. 7, 2007) at 142-43.

[18] Because the trial court admitted this testimony under the "open door" doctrine, the State did not attempt to lay a foundation for the admission of this same testimony under ER 801(d)(2)(v).

On appeal, the State acknowledges that Godfrey's statements to Shaffer were "testimonial" hearsay under *Crawford* and that Navarro was deprived of his right to cross examine Godfrey. But it argues that (1) defense counsel opened the door to admission of these statements; and (2) even if defense counsel did not open the door, any error was harmless. We agree with the State's latter assertion: Even assuming error, without so holding, any violation of Navarro's confrontation rights was harmless beyond a reasonable doubt.

A. Standard of Review

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford*, the Supreme Court held that the Confrontation Clause allows a trial court to admit "testimonial" hearsay only if the declarant is unavailable and the defendant had an earlier opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68.

We review an alleged violation of the confrontation clause de novo. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007) (citing *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)). But,

> [a] confrontation clause violation is subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In evaluating whether the error is harmless, [we apply] the "'overwhelming untainted evidence'" test. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005) (quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)), *aff'd on other grounds by* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id*.
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> Evidence that is merely cumulative of overwhelming untainted evidence is harmless. *State v. Nist*, 77 Wn.2d 227, 236, 461 P.2d 322 (1969); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*,

> 31Gonz. L.Rev. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.").

State v. Flores, 164 Wn.2d 1, 18-19, 186 P.3d 1038 (2008).

B. Harmless Error

Shaffer's testimony about Godfrey's statements following the search of her residence was minimal and established only that Godfrey had acted as a middleman by distributing drugs she obtained from a "Mexican" supplier. The CI's testimony and the October 10 recording also clearly and unequivocally established that Godfrey obtained the heroin that she sold to the CI from a Mexican man she contacted specifically for the purpose of obtaining drugs to sell to another person. Furthermore, Shaffer's testimony about Godfrey's statements to him was not the only evidence that corroborated the CI's testimony: The recording of the October 10 controlled buy also corroborated the CI's testimony. And the CI's testimony, the deputies' testimonies, the photographic evidence, and the vehicle registrations all unequivocally support the convictions regardless of the challenged testimony.

Given the strength of the evidence and the similarity between the challenged evidence and the untainted evidence introduced through the CI's testimony and the October 10 recording, we hold that any potential error in admitting Shaffer's testimony about Godfrey's statements was harmless. Accordingly, Navarro's Confrontation Clause argument fails.

II. Ineffective Assistance of Counsel

Navarro next argues that if we hold that defense counsel opened the door to the challenged testimony, defense counsel provided ineffective assistance of counsel. Because we

hold that any error was harmless, we need not consider whether defense counsel "opened the door" and we do not address this ineffective assistance of counsel argument.[19]

We affirm Navarro's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.

[19] To establish ineffective assistance of counsel, Navarro would have to establish deficient performance *and* resulting prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). "If either part of the test is not satisfied, the inquiry need go no further." *Hendrickson*, 129 Wn.2d at 78. Navarro cannot establish the necessary prejudice.